

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 962 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?  
Nos. 1, 2 & 5 Yes.  
Nos. 3 & 4 No.
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BASHIRKHAN @ BABUKHAN MOHMEDKHAN PATHAN

Versus

STATE OF GUJARAT

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Appearance:

MR K.J SHETHNA for Petitioner

MR.S.R.DIVETIA, PUBLIC PROSECUTOR for Respondent -State.

MR.J.M.VASU for Respondents No.2, 3 & 4.

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CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 13/09/96

ORAL JUDGEMENT

This Criminal Appeal is directed against the judgment and order dated 16.10.1985 passed by the learned Additional City Sessions Judge, Court No.2, Ahmedabad, in Sessions Case No. 41 of 1985 whereby he convicted the present Appellant Bashirkhan alias Babukhan Mohmedkhan Pathan under section 307 of IPC and sentenced him to rigorous imprisonment for a period of three years and to

pay a fine of Rs.200/- and in default to suffer further rigorous imprisonment for two months. He was also found guilty and convicted under section 324 of IPC and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.100/- and in default to suffer further rigorous imprisonment for one month. The substantive sentences were ordered to run concurrently. The other Accused persons namely Abbasbhai Usmanbhai and Ibrahimbhai Usmanbhai were acquitted.

With regard to an incident dated 1.10.1984 which happened in the City of Ahmedabad in a chawl near Rozi Cinema in house No. 562/39 at 1.45 a.m. the FIR was lodged by one Parvezkhan against three Accused persons namely Bashirkhan, present Appellant and two other Accused persons namely Abbasbhai and Ibrahimbhai. The incident happened in the intervening night of 30th September and 1st October, 1984 at 1.45 a.m. and it was alleged that three Accused persons with common intention to commit murder of Alamkhan attacked him. It was alleged that Accused No.1 inflicted blows with Barchhi and Accused No.2 and 3 inflicted blows with Knives over his face and other parts of the body and the injuries sustained by Alamkhan could have caused his death and the Accused persons would have been held guilty of the offence of the murder in case Alamkhan would have died due to these injuries. The present Appellant inflicted blows with Barchhi on Alamkhan and Parvezkhan. Accused No.2 was alleged to be armed with knife and he had also attacked Alamkhan. With regard to Accused No.3 Ibrahimbhai, it was told that he was not carrying any arm but he did give blows. Parvezkhan had intervened to save his father and sustained injuries. The Accused persons as well as the members of the complainant family are residing in the same area and are also said to be related mutually. The dispute is said to have started because the Ahmedabad Municipal Corporation had acquired land where the complainants forefathers were residing. The land was acquired for the purpose of construction of vegetable market during 1976-77. Usmanbhai who was doing the business of transport and truck driving had unlawfully taken possession of the said land and gradually he had constructed godowns over it and had retained one of them for his business and office which he was running in the name of New Avdhut Roadways. The remaining godowns were let out to Gurukrupa Roadways Transport Company and the other godowns were being used by Punjab Transport, Shreeji Transport and Bedco Transport Companies for their business purpose. It is said that during September, 1977 to April, 1981, Alamkhan had preferred application to the Ahmedabad Municipal

Corporation for initiating action of removal of unauthorised encroachment which had been made by the Accused persons but the employees of the corporation did not take any action and therefore on 15.8.1982 and 8.7.1983 Alamkhan preferred application to the Corporation and on the basis of these applications proceedings were initiated for removal of the unauthorised encroachments. When the proceedings were initiated for demolition of the godowns constructed in an unauthorised manner, Usmanbhai and other godown keepers instituted a civil suit and obtained injunction against the corporation. The relations between family members of Alamkhan and Accused were strained for that reason and the security proceedings were also held during July and August, 1983 and the cross-cases were pending between the parties at the time of incident. On 30.9.1984 at about 10.00 p.m. to 10.30 p.m. Alamkhan and Parvezkhan went to sleep on their respective cots outside their house after taking their meals. While Alamkhan slept on cot near the threshold of their house and just near these two cots Begumbibi was sleeping on the ota of their house and two street lights and one private light situated near their house were lighted. At about 1.45 a.m. Alamkhan while he was asleep on the cot received blows over his face near his right eye and found that Bashirkhan, the present Appellant was standing near his cot to his left with a Barchhi in his hand and Abbasbhai was standing with a knife in his hand and Ibrahimbhai was standing near Abbasbhai. Alamkhan raised alarm while present Appellant Bashirkhan inflicted blows over his face left side shoulder and middle finger of his right hand and he remained conscious till he received two or four blows but thereafter due to severe bleeding he became unconscious. His sons Parvezkhan, Aslamkhan and his wife Begumbibi on hearing alarm raised by Alamkhan also wake up, reached near him and saw the Accused persons inflicting blows with their respective weapons on Alamkhan while Accused No.3 was standing near them. Parvezkhan intervened to save his father and sustained injuries at the hands of Bashirkhan with his Barchhi and thereby hurt also his right hand. Parvezkhan ran to Sarangpur Water Tank, three accused persons chased him but could not catch hold of him and while they were at a distance of 10 to 15 paces on the road, they boarded an autorickshaw which was standing there and ran away in the said autorickshaw. Thereafter, Parvezkhan returned near Alamkhan and found that his condition was serious and he was profusely bleeding and therefore he along with his brother Aslamkhan went to a nearby hotel and contacted Municipal Fire Brigade Station and made request for Ambulance at their house and after this request they returned to their

house. Within eight to ten minutes the Ambulance reached and by that time Aslamkhan had gone to his elder brother Firdoskhan and the other brothers and the mother went with Alamkhan in the Ambulance. Alamkhan was admitted in the emergency ward of the said Hospital for treatment as an indoor patient. He was found to have sustained grievous injuries and loss of vision of his right eye as also the fractures and was discharged after 12 days. Informant Parvizkhan was also examined and treated for injury on the said night. At about 3.15 a.m. the Police Constable Natvarsingh who was on duty at V.S.Hospital gave intimation about this incident to the Medical Officer of the said hospital and also recorded the same in Vardhi book and also gave intimation about it on telephone to Shaherkotada Police Station. There upon P.S.O. Laxmansingh got information recorded in Vardhi book kept at the said police station. P.S.I.Chavda went alongwith his staff to V.S.Hospital and found Alamkhan to be under treatment in the emergency ward and informant Parvezkhan was standing nearby him. P.S.I.Chavda thereafter recorded the information from the informant Parvezkhan pertaining to this incident at V.S. Hospital between 3.20 to 4.00 a.m. and sent the same along with his report to Shaher Kotada Police Station for registering the offence u/Ss. 307, 324, and 114 IPC and 135 of Bombay Police Act against all the three Accused persons as being Shaher Kotada Police Station C.R.No. 418 of 1984 at 4.30 a.m.

On 1.10.1984 at about 7.00 a.m. Police Inspector Mankadia took over investigation of this case from P.S.I.Chavda. He went to the place of offence and called informant Parvezkhan and drew panchnama of it and seized blood stained earth, quilt, pillow, chorsa, hand-fan etc. and after sealing these items and pastubg slips the signatures of panchas were taken over them and he also made inquiry about the Accused persons but they were not found at their residence. Further statement by the Police was recorded and he went to the V.S.Hospital and recorded statement of Alamkhan and Begumbibi. At that time Alamkhan's physical condition was not good and therefore, it was not possible to record his statement at that time. He then went to record the statement of other witnesses. On 2.10.1984 the statement of police constable Natvarsing and Laxmansing and other neighbouring occupants were recorded but even after inquiries of the neighbouring occupants whereabouts of the Accused persons could not be known. On 3.10.1984 Police Constable Bhikhabhai produced blood stained clothes of Alamkhan which were on his body at the time of occurrence and these clothes after they had been obtained

from the V.S.Hospital were seized under panchnama and the statement of Bhikhabhai was also recorded. On 5.10.1984 at about 8.00 p.m. three accused persons presented themselves at Shaher Kotada Police Station and they were arrested for these offences by P.I.Mr.Mankodia and arrest panchnamas were made. At the instance of Shri Bashirkhan and Abbasbhai, Accused Nos. 1 and 2 respectively, recovery of Barchhi and Knife were made by Shri Mankodia and panchnamas were prepared. Recoveries were made from within the compound wall and the old cabin near Madhavbaug from a heap of stones and waste and the panchnamas had been prepared accordingly. Muddamal articles no. 1 to 8 were sent to the Director, Forensic Science Laboratory on 11.10.1984 and the report of the Forensic Science Laboratory was received on 27.2.1985 and that of Serologist on 6.4.1985. On 13.10.1984 statement of Alamkhan had been recorded at his residence and the certificate of injuries of Parvezkhan had been received on 26.11.1984. The injury report in respect of Alamkhan was received on 29.12.1984.

After the investigation chargesheet was submitted u/Ss. 307, 324 and 114 IPC and section 133(1) of the Bombay Police Act in the Court of Metropolitan Magistrate, 3rd Court, Ahmedabad on 16.1.1985. The learned Magistrate committed the accused to the Court of Sessions at Ahmedabad to stand trial for the aforesaid offences. Accused persons were then charged for the offence as above. They pleaded not guilty and claimed trial. After examining the prosecution witnesses, statements of the Accused persons were recorded u/s. 313 of the Code of Criminal Procedure.

The prosecution had in all examined 12 witnesses. No witness was examined in the defence. The Trial Court classified and appreciated the evidence in different groups i.e. medical evidence, evidence of motive, eye witnesses and the evidence of police officials and other witnesses. So far as the evidence with regard to the motive of the commission of the offence is concerned it can be straight way said on the basis of the testimony of Alamkhan, Parvezkhan and Alamkhan's repeated applications which were moved by Alamkhan before Ahmedabad Municipal Corporation during September, 1977 to April, 1981 and 25.8.1982 to 8.7.1983 for removal of unauthorised and illegal encroachment constructed by Usmanbhai and other Godown keepers that, it was the main cause for the Accused persons to come out against Alamkhan to teach him a lesson. Topography of the place of the offence near the house of Alamkhan on the basis of the sketch were prepared and it is clear from the evidence of Circle

Inspector Mr.P.P.Patel that the complainants did have a cause of grievance and there was unauthorised encroachment by Usmanbhai and other Godown Keepers and on this count relations between Accused complainant party were strained for a considerable time and the criminal proceedings for security under section 107 of the Code of Criminal Procedure had also taken place between the parties and thus there was a motive and cause for this incident at the instance of the Accused persons against complainant party. Out of three eye witnesses i.e. Alamkhan, Parvezkhan and Aslamkha. Parvezkhan and Alamkhan are the persons who have sustained injuries in this incident and therefore their evidence is mutually corroborative with regard to the happening of the incident and the injuries sustained by Alamkhan and Parvezkhan at the hands of the Appellant.

Dr.A.C.Patel, Dr.R.M.Khamar and Dr.V.A.Chotai have been examined by the prosecution. Dr.Patel was attached to the V.S.Hospital casualty and he was on duty on the night of the incident and he has deposed that Parvezkhan and Alamkhan had come to him without police yadi for treatment and he on examination found that Parvezkhan had sustained injury over his right hand thumb. It was fresh and bleeding. He has stated that this injury was simple and possible by any sharp cutting instrument like blade or knife. He took out the case papers and issued the certificate. His evidence is corroborated by contents of the case papers and the certificate issued by him. Dr.Chotai who was Registrar attached to the V.S.Hospital was on duty on the night of the incident. He deposed that Alamkhan was admitted in the emergency ward for his treatment. He had examined Alamkhan at about 3.40 a.m. in the said emergency ward and he found that Alamkhan had sustained nine injuries as described by him in his statement and the same are reproduced as under :

i) 'C' shaped incised wound with avulsion flap over the side of the face of size 10 cm. X 1 cm. X 1 cm.

ii) Oblique incised wound extending from left side of the scalp, 1 cm. lateral to the outer canthus of left eye and 2 cm. lateral to the left angle of the mouth extending to the midline below chin of size 21 cm. X 1 cm. X 1 cm.

iii) Oblique incised wound extending parallel to the injury no.2 cutting the outer canthus of the left eye of size 21 cm. X 1 cm. X 1 cm.

iv) Oblique incised wound in between injuries nos. 2 and 3 left side of the face 7 cm. X 1 cm. X 1 cm.

v) 'Y' shaped incised wound extending from the bridge of the nose till vertex of the scalp of size

[a] 8 cm. X 1 cm. X 1 cm. and

[b] 6 cm. X 1 cm. X 1 cm.

vi) Oblique incised wound over the right side of the face extending from vertex till the cheek 3 cm. lateral and above the right angle of the mouth and sclera of the right eye was cut and loss of vision of right eye and size was 20 cm. X 1 cm. X 1 cm.

vii) Incised wound extending from 2 cm. anterior and above the superior margin of the right ear to the lower level of the tragus of the right ear of size 15 cm. X 1 cm. X 1 cm.

viii) Incised wound right posterior axillary fold sub-cutaneous deep so size 4 cm. X 1 cm. X 0.5 cm.

ix) Contused lacerated wound over the right middle finger proximal inter-phalangeal joint of size 2 cm. X 1 cm. X 0.5 cm.

He has also deposed that necessary direction was given to Alamkhan and X-rays of skull, right forearm and chest taken by the Radiologist were received on 3.10.1984 and there were seven X-ray plates. His evidence is also fully corroborated by the contents of the case papers, X-ray plates and the report of the Radiologist and the certificate issued by him and all the injuries sustained by Alamkhan are also proved including injuries no. 5, 6, 9 which were found to be grievous in nature and on account of injury no.6 he had lost complete vision of his right eye. Similarly Dr.Khamar who was also attached to the V.S.Hospital Orthopaedic Unit and was on duty on the night of the incident has stated that he had examined Alamkhan in the emergency ward at 8.20 a.m. and was given necessary treatment in connection with the injuries received by him over his head, face and right hand by Dr.Chotai and that the patient was referred to him only for the limited purpose of the injuries and the fractures sustained in the right hand. His evidence is also fully corroborated by the contents of the case papers and on the basis of this evidence also it is clear that Alamkhan had received these injuries out of which injury of right finger was grievous in nature and it has resulted into compound fracture and that too resulted into some permanent physical disability. On consideration of the oral evidence, medical evidence and the evidence of the

investigating officer and other witnesses the Trial Court found that so far as the Accused No.1 Bashirkhan was concerned the prosecution was able to prove the case beyond any reasonable doubt but he did not find the prosecution evidence to be sufficient to connect Accused Nos. 2 and 3 and with the crime and on account of certain discrepancies and infirmities in the evidence of prosecution witnesses and the statement that Accused No.3 did not pay any active part in the incident and in view of these infirmities and material regarding non disclosure of the name of the assailant at the earliest possible opportunity, these two Accused persons were taken to be simply on-lookers or silent spectators and accordingly benefit of doubt was given to them and they were acquitted. However, there being no Appeal against their acquittal, I need not go into the details about these two Accused persons who have been acquitted. With regard to present Appellant Bashirkhan, Accused No.1 in the Trial Court, Mr.K.J.Shethna submits that once the other two Accused persons have been acquitted, there is no question of any common object or common intention and therefore section 34 could not be invoked against him. He has also submitted that so far as offence under section 307 IPC is concerned, in the facts and circumstances of this case, it is not made out that the injuries which have been found were not so grave in nature that it could have resulted into death of Alamkhan and such injuries also cannot be said to have been caused by the present appellant alone when it was also the case of the prosecution that Accused No.2 also had a knife with him. He has also referred to the discrepancy in the statement of certain witnesses with regard to Barchhi and Farsi. Mr.Shethna has also invoked the doctrine of minimum liability and has referred to AIR 1963 SC Pg.1413 [Krishna Govind Patil Vs. State of Maharashtra ], AIR 1988 SC Pg.2111 at pg.2127 [Mahesh Chand Vs. State of Rajasthan] Besides these cases, AIR 1971 SC Pg.2156, head note 'C' [Raghubir Singh Vs. The State of U.P.], AIR 1959 SC Pg.484 [K.A.Abbas Vs.Union of India ] and 26(2) GLR Pg.994 [State of Gujarat Vs.Mazoorali Alibax & Others] , 1995 SCC (Cri.) Pg.947 Gurdial Singh Vs.State of Punjab] were cited. The argument of Mr.Shethna is that, on the basis of the evidence it cannot be said that it was the present appellant and the appellant alone who was responsible for causing all the grievous injuries no. 5, 6 and 9, and therefore he cannot be held liable straight way under section 307 of IPC when other Accused persons have been acquitted more particularly because Accused No.2 i.e.Abbasbhai was also alleged to be carrying sharp edged weapon i.e. knife. He has submitted that at the most, in the facts and



circumstances of the case, on the basis of the evidence, the Appellant could be convicted only for the offence under section 324 IPC, and therefore, even if it is found that it is not a case of acquittal, the conviction deserves to be altered from section 307 to 324 of the IPC. It has been further argued by the learned counsel for the Appellant that in case the present Appellant is convicted for the offence under section 324 IPC, the maximum sentence there under is three years only and in that case this Court may also consider to give the benefit of the provisions of the Probation of Offenders Act to the present Appellant.

I have considered the submissions made by the learned counsel for the appellant Mr.K.J.Shethna and the learned public prosecutor and I do find that on the basis of the evidence in the facts and circumstances of this case all the three grievous injuries can not be said to have been caused by the Appellant and the Appellant alone, when Accused No.2 was also armed with sharp edged weapon and has been acquitted, and therefore it would not be safe to convict the present Appellant under section 307 but the present appellant is certainly liable to be convicted u/s. 324 IPC, therefore, his conviction is altered from that section 307 to be that u/s. 324 IPC. However that by itself cannot put the end of the matter because the Trial Court has sentenced the present Appellant for a period of three years u/s. 307 IPC and for a period of six months and fine of Rs.100/- for the offence u/s.324 IPC. In the facts and circumstances of the case, I do not find it to be a fit case to grant the benefit of the provisions of the Probation of Offenders Act to the present Appellant. It was submitted by Mr.Shethna that the incident is as old of 1984 and he had also remained in jail for a short period during the pendency of the trial and he also submitted that the complainant-party can be adequately compensated by paying heavy amount of compensation instead of now sending the present Appellant to Jail after a period of nearly 12 years from the date of the incident.

Accordingly, the conviction of Appellant is altered from 307 to 324 IPC and thus while setting aside the conviction and sentence of the Appellant u/s. 307 IPC upholding his conviction u/s. 324 IPC the sentence in respect of the Appellant u/s. 324 IPC is reduced to the period for which he has remained in jail during the pendency of the trial subject to the condition that the Appellant shall deposit a sum of Rs.1,25,000/- in this Court.

It may also be mentioned that before the judgment could be dictated Mr.J.M.Vasu, learned Advocate had appeared on behalf of the complainant-party and submitted that Alamkhan who had sustained injuries in the aforesaid incident had lost his eye and had expired on 4.2.1990 during the pendency of this Appeal and it has also been submitted by Mr.Vasu that Alamkhan had filed Civil Suit No. 3842 of 1987 in the City Civil Court, Ahmedabad for compensation claiming sum of Rs.1,00,000/- against Bashirkhan - present Appellant and two other Accused persons. The said suit was filed in forma pauperis and he has also filed affidavit on behalf of all the legal heirs of Alamkhan including his wife, daughters and sons. All the legal heirs are present and they are duly identified by Mr.Vasu, learned Advocate who is also representing them in the City Civil Court. He has further submitted that in case the amount of compensation as granted by this Court is deposited the said suit will not be pressed and same shall be withdrawn by all the legal heirs. It has been submitted on behalf of the present Appellant that he is prepared to deposit the amount of compensation of Rs.1,25,000/- as ordered by this Court. He further undertakes to deposit the amount of court fees in the Civil Suit and after the amount of court fees is deposited Mr.Vasu undertakes to withdraw the suit on behalf of all the legal heirs who are prosecuting the suit and both the learned counsel submit that no party would take any objection to this course being adopted before the Civil Court so that the civil litigation also comes to an end. Mr.Vasu submits that the legal heirs have mutually agreed to share this amount of Rs.1,25,000/- in eight equal shares amongst them so that each one of the eight legal heirs get Rs.15,625/-. The Appellant's undertaking to deposit the due amount of court fee in the aforesaid Civil Suit shall be enforceable against the Appellant as a condition under this order. Copies of the applications and affidavits dated 11.9.1996 and 13.9.1996 filed by the legal heirs of Alamkhan shall also be sent to the concerned Civil Court.

In view of the above, this Criminal Appeal is partly allowed. The conviction and sentence for the offence u/s. 307 IPC as ordered and awarded by the Trial Court is set aside but the conviction for the offence u/s. 324 IPC is maintained and the sentence of six months as awarded by the Trial Court for the offence of 324 IPC is reduced to the period for which the Appellant has already remained in jail while maintaining the fine of Rs.100/- as ordered by the Trial Court for the offence

u/s. 324 IPC subject to the condition that the Appellant Bashirkhan alias Babukhan Mohmedkhan Pathan who is already on bail deposits a sum of Rs.1,25,000/- in this Court as compensation u/s 357 of the Code of Criminal Procedure. In case the Appellant violates any of the conditions as set out in this order, he shall be called upon to serve the full period of sentence as was awarded by the Trial Court for the offence u/s. 324 IPC. The Appellant shall deposit the amount of Rs. 1,25,000/in the Nazir Department today and it will be open for the parties i.e. legal heirs of deceased Alamkhan represented through Mr.Vasu, Advocate to withdraw this amount from the Nazir Department as has been mutually agreed between them as stated above. Copy of this judgment may also be sent to the Registrar, City Civil Court, Ahmedabad.

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